Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

REBECCA BROOKS,

Petitioner,

v.

DELTA AIR LINES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DID THE ELEVENTH CIRCUIT ERR WHERE IT AFFIRMED A DISTRICT COURT'S RULING THAT NO REASONABLE JUROR COULD FIND THAT AN EMPLOYER'S EFFORTS TO PREVENT FURTHER HARASSMENT OF AN EMPLOYEE WERE INADEQUATE?

PARTIES TO THE PROCEEDING

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OPINIONS BELOW

The January 26, 2000 per curiam decision of the Court of Appeals, Eleventh Circuit, is unreported. A copy of the decision is included in the Appendix. (App. E, pp. 48a-49a).

The October 1, 1998 decision by the District Court on reconsideration is unreported. A copy of the decision is included in the Appendix. (App. C, pp. 38a-45a).

The March 27, 1998 decision by the District is unreported. A copy of the decision is included in the Appendix. (App. B, pp. 30a-37a).

The February 18, 1998 Magistrate Judge's Report and Recommendation in an Employment Discrimination is included in the Appendix (App. A, pp. 1a-29a).

JURISDICTION

On January 26, 2000, the Court of Appeals for the Eleventh Circuit affirmed the October 1, 1998 decision of the District court. (App. E, pp. 48a-49a). The judgment to be reviewed was entered on October 1, 1998. (App. C, pp. 38a-43a). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

FEDERAL STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e *et seq.*), by the Civil Rights Act of 1991, 42 U.S.C. §1981A.

Because of the length of these statutes, only the relevant sections of the text of these provisions are set out in the Appendix (App. F, pp. 50a-52a).

STATEMENT OF THE CASE

Brooks' complaint alleged a sexual harassment claim under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000(e) *et seq.*) as amended by the Civil Rights Act of 1991. Brooks requested a jury trial.

This action challenges the Eleventh Circuit's per curiam affirmance of the district court's granting of Delta Air lines' summary judgment motion as to Brooks' Title VII sexual harassment claim and the district court's failure to allow her to proceed to trial. Brooks' sexual harassment claim was based upon the hostile work environment theory. Summary judgment was granted based upon the district court's determination that the corrective action taken by Delta Airlines in response to the sexual harassment was dispositive as to whether Brooks could survive a motion for summary judgment. (App. C, p. 41a). The district court then summarily ruled that no reasonable juror could find that Delta Air Lines' efforts to prevent further sexual harassment of Brooks were inadequate. (App. C, pp. 41a-43a). As a result, the district court granted Delta Airlines' motion for summary judgment. (App. C, pp. 38a-43a).

In the instant case, Brooks, a female Delta Air Lines employee, was subjected to two instances of sexual harassment by the same co-employee. The first incident occurred in 1989, where the harasser exposed his genitals to Brooks at her workplace. Brooks reported the incident, and the harasser admitted his conduct to his employer. Following this incident, Delta Air Lines took remedial action and disciplined the harasser. A second incident occurred in 1993, where the same har-

asser on his first opportunity to see Brooks in four years gave her an unwelcome hug. Brooks immediately reported the incident, and once again, Delta Airlines took limited remedial action. Following the second incident, Brooks was not able to return to work and subsequently filed a sexual harassment charge with the Equal Employment Opportunity Commission. Brooks then filed a lawsuit – the subject of this action.

In response to Delta Airlines' motion for summary judgment, the magistrate judge issued the *Magistrate Judge's Report and Recommendation in an Employment Action* (hereinafter "*Report*") on February 18, 1997.[1] The report denied Delta Air Lines' motion for summary judgment as to the Title VII sexual harassment claim. (App. A, pp. 14a-21a). The magistrate judge noted that a "plaintiff can establish a prima facie case for a hostile work environment sexual harassment claim by showing that: (1) the employee belongs to a protected group; (2) the employee was subjected to unwelcome sexual harassment; (3) the harassment complained of was based upon sex, (4) the harassment complained of affected a "term, condition or privilege of employment, and (5) either that the harasser meets the definition of employer or that the employer is liable through respondent superior." *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1557 (11th Cir. 1987). (App. A, p. 16a). The magistrate judge also noted that while untimely acts of sexual harassment do not create actionable causes of action, the acts may be used as relevant background evidence in a determining if a plaintiff can withstand

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[1] In the United States District Court Northern District of Georgia, any complaint containing a Title VII claim is initially assigned to a United States Magistrate Judge.

summary judgment. (App. A, p. 14a). Thus, the magistrate judge considered the totality of the events, including all of the harasser's actions and Delta Air Lines' limited attempts at corrective action, and concluded that Brooks had met her burden and denied summary judgment. (App. A, pp. 14a-21a).

Delta Air Lines filed objections to the *Report.* On March 27, 1998, the district court issued an order affirming the *Report.* (App. B, pp. 30a-37a). The district court agreed with the magistrate that while the "exposure" incident of 1989 and Delta Air Lines' subsequent attempts to remedy the problem were time-barred evidence in establishing a prima facie case of discrimination, such evidence could be used as "relevant background evidence where the status of a current practice is at issue." *United Air Lines, Inc. v. Evans,* 97 S.Ct. 1885, 1889 (1997). (App. B, p. 34a). Thus, the district court concluded that Brooks had established a *prima facie* case for a hostile work environment. Furthermore, the district court held that, based upon the evidence, a reasonable juror could conclude the harasser's 1993 conduct was sufficiently abusive so as to create a hostile work environment, and the defendant failed to take prompt remedial action. (App. B, pp. 34a, 35a).

Delta Air Lines requested reconsideration or an interlocutory appeal. On October 8, 1998, the district court, with a different judge reviewing the summary judgment motion, reconsidered the earlier order and reversed the earlier ruling. (App. C, pp. 38a-43a). The district court held that the dispositive issue was: "could a reasonable juror conclude that Delta Air Lines' remedial actions taken after the 1993 incident were inadequate?" In this context, inadequate means that the action is not "reasonably calculated to prevent further harassment."

Sanchez v. City of Miami Beach, 720 F. Supp. 974, 980 (S.D. Fla. 1989). In analyzing this question, the district court apparently failed to look at the totality of the circumstances as the other judges and viewed Delta Air Lines' remedial actions as isolated responses to the harassing incidents that triggered the response. This was done even though the district court noted that the harasser blatantly chose to ignore the earlier corrective actions taken by Delta Air Lines in response to the 1989 incident. (App. C, p. 43a). In spite of this recognition, the district court failed to consider these facts when analyzing the adequacy of the corrective actions taken by Delta Air Lines following the 1993 harassment incident. Thus, the district court erroneously held that no reasonable juror could find Delta Air Lines' remedial actions inadequate. (App. C, p. 43a). Yet, surely a reasonable juror who considered all of the facts and information known to Delta Air Lines following the 1993 harassment incident – as is allowed by the law – could have found Delta Air Lines' 1993 remedial actions inadequate. Thus, the granting of summary judgment and the denial of Brooks' right to a jury trial was erroneous.

A. Proceedings Below.

1. On August 5, 1996, the case was filed in the State Court of Fulton County, Georgia. After the dismissal of various state law claims, the case was removed to the United States District Court for the Northern District of Georgia, Atlanta Division, by Delta Air Lines on September 3, 1996. Because the case contained Title VII claims, it was assigned to a magistrate judge.

2. On July 14, 1997, Defendant Delta Air Lines, Inc. filed a motion for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure with

regards to Brooks Title VII sexual harassment claim and Americans with Disabilities Act claim.[2]

3. On February 18, 1997, the Magistrate Judge issued the *Magistrate Judge's Report and Recommendation in an Employment Action* ("*Report*"). (App. A, pp. 1a-29a). The Magistrate Judge, noting the existence of material issues of fact, recommended that Delta Air Lines, Inc.'s motion for summary judgment be denied as to both the Title VII claim and the Americans with Disabilities Act claim. Delta Air Lines filed objections to the *Report* for consideration by Senior United States Senior Judge Richard Freeman.

4. On March 27, 1998, the *Report* was adopted by an Order entered by the Senior United States District Court Judge Richard Freeman, who noted that triable jury issues existed as to Brooks' Title VII sexual harassment claim and the Americans with Disabilities Act claim. (App. B, pp. 30a-37a). On April 13, 1998, Delta Air Lines moved for reconsideration, or, in the alternative, for an interlocutory appeal.

5. On October 1, 1998, on reconsideration, United States District Court Senior Judge Marvin Shoob entered an order ruling in favor of Delta Air Lines' motion for summary judgment on both Brooks' Title VII sexual harassment claim and the Americans with Disabilities Act claim. (App. C, pp. 38a-45a). Brooks noticed her intent to appeal this order on October 23, 1998. (App. D, pp. 46a-47a).

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[2] The only claim before the Court is Brooks' Title VII claim.

6. On January 26, 2000, the United States Court of Appeals for the Eleventh Circuit issued a per curiam affirmance of the October 1, 1998 order. (App. E, pp. 48a-49a).

B. Statement Of Facts

Rebecca L. Brooks, a female employee of Delta Air Lines, was hired in 1969. (App. A, p. 2a). During the relevant time period, Brooks was assigned to Delta Air Lines' Atlanta airport operations in Atlanta, Georgia. (App. A, p. 2a-3a). Brooks held the position of passenger service agent. (App. A, p. 2a). On September 4, 1989, Brooks went to the ticketing area to get some information about a lost bag. (App. A, p. 3a). While Brooks was there, a male co-employee exposed his genitals to her. (App. A, p. 3a).

Brooks left the area and reported the incident to supervisors. (App. A, p. 3a). Brooks was asked to provide a written statement describing the event. (App. A, p. 3a). Brooks also told management that she could not work in the same location as the harasser. (App. A, p. 3a). Delta Air Lines obtained a written statement from the harasser admitting that he had exposed himself to Brooks. (App. A, p. 3a). Delta Air Lines immediately suspended the harasser and escorted him off airport premises. (App. A, p. 3a). Delta Air Lines ordered a mental evaluation of the harasser, and the physician concluded that the harasser's actions were not indicative of any underlying psychological problems. (App. A, 4a). The report indicated that the harasser could come back to work with no restrictions. (App. A, 4a).

Delta Air Lines disciplined the harasser as follows: (1) suspension without pay and benefits for one month; (2) transfer to the cargo department located in a different building some distance from plaintiff's work site; and (3) a letter of reprimand placing the harasser on final

warning status for one year. (App. A, p. 4a). The harasser was only given oral instructions to avoid contact with Brooks. Additionally, the supervisors to whom Brooks and the harasser reported were not advised to avoid assigning them to the same work area. (App. A, p. 4a).

Two Delta officials recommended termination of the harasser, but the EEO director decided against it. (App. A, p. 4a). The EEO director also decided not to transfer the harasser to another city based partially upon hardship that might occur to the harasser's family. (App. A, p. 4a).

Upon the conclusion of the one year probation period, another letter was issued to the harasser and discussed with him. The letter, which the harasser signed, stated "acts of this nature cannot and will not be tolerated. You are expected to conduct yourself in a professional manner at all times or further disciplinary action may be taken." (App. A, p. 5a).

Brooks and the harasser had no contact until March 16, 1993. (App. A, p. 5a). As a result of unusual weather conditions, Brooks and the harasser were assigned to work in the same area. (App. A, p. 5a). When the harasser spotted Brooks, he walked up to her and declared "I want a hug," and proceeded to embrace her with both arms. (App. A, p. 6a). The encounter was immediately reported to Delta Air Lines management, who investigated the incident. (App. A, p. 6a).

Following the March 16, 1993 incident, Delta Air Lines again counseled the harasser. The harasser was initially orally counseled and reprimanded, and a letter memoralized the counseling. (App. A, p. 6a). The letter instructed the harasser to have no contact of any kind with Brooks. The harasser signed the letter indi-

cating that he understood the contents. (App. A, p. 6a). While Brooks' harasser was allowed to continue in his employment, Brooks could not return to work following the second incident.

At the relevant time, Delta Air Lines had a policy prohibiting sexual harassment. After both incidents of harassment, Brooks followed the policies and procedures of her employer and promptly reported the incidents. (App. A, p. 6a). On or about August 10, 1993, Brooks filed a charge of discrimination with the Equal Employment Opportunity Commission alleging sexual harassment. (App. A, p. 6a).

REASON FOR GRANTING THE WRIT

The district court failed to properly apply the law and the evidence in its analysis of whether an employer's remedial action in response to a sexual harassment claim is adequate to prohibit liability for the employer. Due to this misapplication of the law and the evidence, the district court erroneously granted Delta Air Lines' motion for summary judgment as to Brooks' Title VII sexual harassment claim and the Eleventh Circuit per curiam affirmance of the order.

DID THE ELEVENTH CIRCUIT ERR WHERE IT AFFIRMED A DISTRICT COURT'S RULING THAT NO REASONABLE JUROR COULD FIND THAT AN EMPLOYER'S EFFORTS TO PREVENT FURTHER HARASSMENT OF AN EMPLOYEE WERE INADEQUATE?

Rule 56 (c) mandates the entry of summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden

of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). While evidence and factual inferences are to be viewed in a light most favorable to the non-moving party, a non-moving party must "go beyond the pleadings and . . . designate specific facts showing that there is a genuine issue for trial." *Id.* at 324. A fact is "material" if it "might affect the outcome of the suit under governing law . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* at 258. Thus, to survive a motion for summary judgment, the non-moving party must come forward with specific evidence of every element essential to its case, so as to create a genuine issue for trial. *Id.* at 323.

Brooks was a female Delta Air Lines employee stationed in Atlanta, Georgia. In 1989, a male co-employee exposed his genitals to Brooks at the workplace. (App. A, p. 3a). Brooks promptly reported the incident to management. The male employee admitted to the conduct, and Delta Air Lines took disciplinary action against him. The action included: (1) suspension of the harasser without pay or benefits for one month; (2) transfer of the harasser to another location away from Brooks; (3) harasser was verbally warned to have no further contact with Brooks; and (4) the harasser was placed on final warning status for one year. (App. A, p. 4a). Delta Air Lines failed to instruct either Brooks' supervisor or the harasser's supervisor that the two employees should not be assigned to the same workplace. (App. A, p. 21a). Brooks and the harasser had no contact with each other until 1993, when they were temporarily assigned to the same work station. Upon seeing Brooks, the harasser approached Brooks

and told her to give him a hug and placed his arms around her. (App. A, p. 5a). Needless to say, Brooks, horrified by this action, immediately reported the second incident to her employer. Following the second incident, Delta Air Lines took the following action: (1) interviewed Brooks, the harasser, another supervisor, and an eyewitness; (2) forwarded the investigation results to the EEO officer; (3) orally counseled and reprimanded Ray; (4) placed a written reprimand in Ray's file stating that he was to have no further contact with Brooks of any kind; and (5) offered to find Brooks another position in its Atlanta operations. (App. A, p. 6a). Following the 1993 incident, Brooks did not return to work and is on complete disability. (App. A, p. 6a).

Brooks claimed that Delta Air Lines' actions or lack of action had created a hostile work environment based upon the sexual harassment of this co-employee. In order to state a claim for hostile work environment, Brooks had to show that (1) she is a member of a protected group; (2) she was the subject of unwelcome sexual harassment; (3) the harassment occurred because of her sex; (4) the harassment affected a term, condition, or privilege of her employment; and (5) the employer knew or should have known of the harassment and failed to take remedial action. *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904 (11th Cir. 1988).

Based upon the facts of the case, no issue existed as to whether Brooks met the first three prongs, and the district court concluded the fourth prong need not be addressed. (App. C, p. 41a). The district court's granting of Delta Air Lines' motion for summary judgment was based upon its dispositive analysis of the fifth prong. The district court cited *Fleming v. Boeing Company* for the proposition that an employer cannot be held directly

liable for sexual harassment by a co-worker where the employer takes immediate and appropriate corrective action. 120 F.3d 242 (11th Cir. 1997). (App. C, p. 41a). Under this analysis, the district court concluded that no reasonable jury could find Delta Air Lines liable for the conduct of the harasser based upon the remedial actions taken by Delta Air Lines. (App. C, p. 43a). In order to reach this conclusion, the district court apparently determined that Delta Air Lines' responses to both of Brook's sexual harassment complaints were immediate and the appropriate corrective action in each case. The district court apparently isolated the actions taken and did not review the remedial actions taken after the 1993 incident in the context of the knowledge that Delta Air Lines had regarding events following the 1989 incident.

The Supreme Court's ruling in *Burlington Indus., Inc. v. Ellerth* requires employers to go beyond immediate and appropriate corrective action. 118 S.Ct. 2257, 2267 (1988). The Court holds that an employer is liable for the harassment of an employee by a co-employee when the employer knows of the harassment or should have known of the harassment and fails to take action to stop it. *Id.* at 2267. The Court's holding analogizes the liability analysis to one used in a negligence theory. *Id.* at 2267. Thus, an employer cannot avoid liability by merely taking immediate and appropriate corrective action. The appropriate corrective action must be action that is reasonably calculated to prevent further harassment of the employee. *Sanchez v. City of Miami Beach,* 720 F. Supp. 974, 980 (S.D. Fla 1989); *Mikels v. City of Durham,* 183 F.3d 323, 329 (4th Cir. 1999); *Katz v. Dole,* 709 F.2d 251 (4th Cir. 1983).

Whether an employer's action is the appropriate remedial action is dependent upon the facts of the

case – the severity and the persistence of the harassment, and the effectiveness of any remedial steps. *Waltman v. International Paper Co.*, 875 F.2d 468, 479 (5th Cir. 1987). Appropriate remedial action should be based upon all the facts of which an employer has knowledge. This is supported by the Court's reasoning that time-barred evidence can be used as relevant background evidence where the status of a current practice is at issue. *United Air Lines, Inc. v. Evans*, 97 S.Ct. 1885, 1889 (1997). To allow an employer to do otherwise would allow an employer to escape liability by negligently responding to sexual harassment complaints or to create "sham" responses. See *Paroline v. Unisys Corporation*, 879 F.2d 100 (4th Cir. 1989), *partially vacated on other grounds*, 900 F.2d 27 (4th Cir. 1990).

Based upon this analysis, genuine issues of material fact existed as to whether Delta Air Lines' 1993 remedial action was reasonably calculated to stop the harassment of Brooks. In an isolated context, the 1993 remedial measures could be considered reasonably calculated to stop the conduct. But where Delta Air Lines had knowledge of the harasser's 1989 exposure of his genitals to the same woman and had knowledge of, as the district court stated, the harasser's "decision to ignore Delta Air Lines' instructions and embrace" Brooks on the first occasion that he had contact with her, a reasonable juror could find that Delta Air Lines' 1993 remedial actions inadequate to halt this man's harassment of Brooks. (App. C, p. 43a).

Courts have held that where an employer has undertaken to provide some remedial action, the adequacy of those efforts will normally be an issue which requires jury resolution. *See, e.g., Mills v. Amoco Performance Products*, 872 F. Supp. 975 (S.D. Ga. 1994); *Munn v.*

City of Savannah, 906 F. Supp. 1577 (S.D. Ga. 1995) (jury issue existed as to the appropriateness of the defendant's remedial action even though no further harassment occurred). Where an employer knows of a harasser's prior conduct and has not stopped the conduct, fact issues to the adequacy of the remedial actions are created. *Paroline v. Unisys Corporation*, 879 F.2d 100 (4th Cir. 1989), *partially vacated on other grounds*, 900 F.2d 27 (4th Cir. 1990).

In the instant case, in 1989, the harasser exposed his genitals in the workplace to Brooks. Brooks immediately reported the incident. As a result of this incident, Delta Air Lines did the following: (1) suspended the harasser without pay or benefits for one month; (2) transferred him to another location away from Brooks; (3) verbally warned him to have no further contact with Brooks; and (4) placed him on final warning status for one year. Yet, Delta Air Lines failed to inform the harasser's supervisor or Brooks' supervisor that the two employees should not be assigned to the same workplace. Additionally, following the one year probationary period, Delta Air Lines did not clearly express to the harasser that he should still refrain from any contact with Brooks. (App. A, p. 4a). The harasser was merely warned that Delta Air Lines would not tolerate "acts of this nature," and the harasser was to conduct himself in a professional manner at all times. (App. A, p. 4a). Basically, Delta Air Lines expected the harasser to police himself.

In 1993, when the harasser proceeded to touch Brooks in an unwelcome manner at his first opportunity to have contact with her, two reasonable and obvious assumptions could be made: (1) Delta Air Lines' prior actions had not been adequate enough to stop harassment of

Brooks by this individual, and (2) Delta Air Lines was on notice that stronger actions were needed. Yet, Delta Air Lines actually did little more than reprimand the harasser and place a letter in his file. As the district court noted, "an employer is not expected to be a guarantor of its employee's freedom from further harassment, rather in order to avoid liability, it need only to take whatever corrective action is reasonably likely to prevent the misconduct from recurring. *Reynolds v. CSX Transp., Inc.*, 115 F.3d 860, 867 (11th Cir. 1987). (App. C, p. 42a). But, an employer is not allowed to feign ignorance of the facts. Here, a reasonable juror could find that Delta Air Lines, based upon its prior knowledge of the harasser and subsequent relevant events, failed to take the corrective action "reasonably likely" to prevent further harassment. As a result, the district court erred in granting Delta Airlines' motion for summary judgment and denying Brooks' right to a jury trial.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the petition for writ of certiorari should be granted.

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APPENDIX A

[Filed FEB 18 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:96-CV-2228-RCF

REBECCA BROOKS,

Plaintiff,

v.

DELTA AIR LINES, INC.,

Defendant.

MAGISTRATE JUDGE'S REPORT AND
RECOMMENDATION IN AN
EMPLOYMENT DISCRIMINATION ACTION

Plaintiff Rebecca Brooks filed this action in the State Court of Fulton County, Georgia, on August 5, 1996, charging that defendant Delta Air Lines, Inc. ("Delta"), through the actions of Delta employee J. B. Ray, subjected her to hostile work environment sexual harassment in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e, *et seq.* Plaintiff also claims that Delta discriminated against her because of her disabling condition in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C.

§§12101-12117, by failing to accommodate her disability. Defendant removed the case to this court as a matter of right on September 3, 1996, and answered the complaint on September 10, 1996.

Defendant has moved for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure on all of plaintiff's claims based upon the pleadings, defendant's statement of material facts, exhibits, and discovery materials submitted by the parties [26]. Plaintiff has fully responded to defendant's motion for summary judgment. For the reasons that follow, the Magistrate Judge recommends that defendant's motion for summary judgment be denied.

BACKGROUND FACTS

When evaluating the merits of a motion for summary judgment, the court must view the evidence and factual inferences in a light most favorable to the non-moving party. *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1529 (11th Cir. 1987). Therefore, for summary judgment purposes only, the following facts are deemed to be true.

Plaintiff Rebecca L. Brooks is a white female who was hired by defendant Delta Air Lines in 1969 (Undisputed). In the 1970's and early 1980s, Plaintiff spent eight years of her career in Delta's Atlanta airport operations, initially working as a ticketing agent, and later as a passenger service agent or "Redcoat." (Undisputed).

While working in Atlanta, plaintiff became acquainted with, and sometimes worked with, a Delta employee named J. B. Ray. (Undisputed). Ray was a co-worker who periodically worked on the same shift with plaintiff. He was never plaintiff's supervisor, and he has never had

authority to hire, fire, discipline, or reprimand plaintiff. (Undisputed). Plaintiff and Ray worked together as passenger service agents for approximately three years. (Undisputed).

From 1982, to 1989, plaintiff worked for defendant in Austin, Texas. (Deposition of Rebecca L. Brooks ("Brooks Dep.") at 41-43). She returned to Atlanta on June 1, 1989, and was assigned to work in local baggage service beginning in August. *Id.*

On September 4, 1989, plaintiff was required to leave her work area and go to the ticketing area at the other end of the terminal to get some information about a lost bag. (Undisputed). While plaintiff was in the ticketing area, J. B. Ray approached her and exposed his penis organ to her. (Undisputed). Plaintiff returned to her work area and reported to Steve McCoy that Ray had exposed himself to her while she was in the audit office behind the ticket desk. (Undisputed). McCoy immediately reported the matter to his supervisor, who instructed McCoy to ask plaintiff for a detailed written statement. (Undisputed). Plaintiff then provided a written statement documenting the event, and McCoy prepared a written statement of what plaintiff had told him. (Undisputed).

Delta investigated Plaintiff's allegation and confronted Ray the following morning, September 5, 1989. (Undisputed). Ray admitted that he had exposed himself to plaintiff. (Undisputed). Defendant obtained from Ray a written statement regarding the incident. (Undisputed). Defendant then immediately suspended Ray, collected his Delta ID and parking card, and escorted him off the airport premises. (Undisputed).

Delta sent Ray to be evaluated by Dr. Floyd P. Garrett. (Undisputed). Dr. Garrett examined Ray and

opined that the incident was a one-time event and not indicative of any underlying psychological problems. (Undisputed). Dr. Garrett reported to defendant that Ray could return to work at any time without restrictions. (Undisputed).

Delta disciplined Ray as follows: (1) suspension without pay and benefits for one month; (2) transfer to the cargo department located in a different building some distance from plaintiff's work site; and (3) a letter of reprimand placing Ray on final letter warning status for one year. (Undisputed). Defendant warned Ray that "[f]ailure on your part to conduct yourself accordingly will result in further disciplinary action being taken, including the termination of your employment." (Pl.'s ex. 13). Ray was also given an oral instruction to avoid contact with plaintiff. (Deposition of Richard Edmond Ealey ("Ealey Dep.") at 103-04). However, the supervisors to whom plaintiff and Ray reported were not advised to avoid assigning them to the same work area. (Deposition of Wayne Harris ("Harris Dep.") at 11-13); (Deposition of Steve McCoy ("McCoy Dep.") 33-34).

Two Delta officials recommended that Ray be terminated. (Pl's ex. 3). However, Richard Ealey, director of equal opportunity, decided against terminating Ray's employment, in part due to the psychiatric evaluation and in part due to plaintiff's statement that she did not want Ray to lose his job. (Ealey Dep. at 34-35, 49, 54-56); (Brooks Dep. at 179). Ealey also decided against transferring Ray to another city because it would cause some hardship to Ray's family. (Ealey Dep. at 73-76, 95-96).

Upon the conclusion of the one-year probation period, Delta issued another letter to Ray. (Undisputed). Ray

was advised that "acts of this nature[, unspecified conduct unbecoming a Delta employee,] cannot and will not be tolerated. You are expected to conduct yourself in a professional manner at all times or further disciplinary action may be taken." (Pl's ex. 15). This second letter of warning was discussed with Ray on October 2, 1990, and he signed it, confirming that he was aware of the possible consequences of further misconduct. *Id.* Thereafter, plaintiff and Ray had no contact at all from September 4, 1989, until March 16, 1993. (Undisputed).

Extreme and unusual blizzard conditions in Atlanta on March 12 and 13, 1993, caused irregular airport operations and left Delta severely understaffed. (Undisputed). Hartsfield Atlanta Airport was closed on March 13 and 14. (Undisputed). As a result of those unusual weather conditions, plaintiff and Ray both were assigned to work in the local baggage service area on March 16, 1993. (Undisputed). Ray came to the terminal from his usual assignment in the international cargo department, and plaintiff came to the terminal from her usual assignment at systems baggage. (Undisputed).

While at the terminal, plaintiff entered a baggage claim area and saw Ray about twenty feet away. Ray saw plaintiff and walked up to her, said "I want a hug," and embraced her with both arms. (Brooks Dep. at 217-19). Ray was working with another Delta employee, Les Conway, who observed the encounter between Ray and plaintiff and gave a written account of his observation. (Undisputed). That encounter was reported to Delta management and defendant investigated the situation and obtained statements from J. B. Ray, Randy Brady, and Les Conway. (Pl's exs. 2, 17). Within a couple of days of the incident, plaintiff also spoke directly with defendant's director of equal opportunity,

Richard Ealey, who obtained her account of what had happened. (Undisputed).

Following the incident on March 16, 1993, defendant counseled Ray against having any contact with plaintiff. Ray was warned that any further contact with plaintiff would lead to severe discipline. (Undisputed). This counseling was then memoralized in a written letter of reprimand issued to Ray which stated that

> due to the recent incident involving you and [plaintiff] you are being formally advised that under no circumstances are you to make contact of any kind with [plaintiff].
>
> To clarify our position, we are informing you that this applies to direct contact, telephone contact and/or written communication. These stipulations also apply both on and off the job.

(Pl's ex. 24). Defendant's management discussed the contents of the letter with Ray and he signed the letter indicating that he was fully aware of the reprimand. (Undisputed).

Plaintiff has not returned to work at Delta since March 16, 1993. (Undisputed). Plaintiff is currently receiving Long-Term Disability benefits from defendant's Family Care Disability and Survivorship Plan, and is receiving Social Security disability payments based on a finding of a medical disability beginning on March 16, 1993. (Undisputed). To receive such benefits, plaintiff has certified that, since March 16, 1993, she has been, and remains completely and totally disabled and is unable to perform any type of work whatsoever. (Undisputed).

Defendant has a policy prohibiting sexual harassment. Delta Standard Practice 1000.3 prohibits sexual harassment and expresses defendant's obligations to make avail-

able equal opportunity to all Delta employees. (Undisputed). This policy is also discussed in various employee orientation and training sessions and in the Standard Practice manuals available to employees at all times in their work areas. (Undisputed). Sexual harassment is considered serious misconduct and violates defendant's policy. (Undisputed). Any employee who believes that he or she has been sexually harassed is strongly encouraged to report the matter. (Undisputed). Any employee who engages in such conduct is subject to disciplinary action, including possible termination. (Undisputed).

Following both the exposure incident in 1989, and the hugging incident in 1993, plaintiff promptly reported Ray's conduct to defendant pursuant to its policy and procedures. Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on or about August 10, 1993, alleging sexual harassment. (Undisputed).

Prior to 1989, plaintiff had received psychological treatment and had been hospitalized for depression. Defendant was informed of this treatment through plaintiff's applications for leaves of absence for treatment and her discussions with management. With treatment plaintiff was able to manage her psychological problems and return to work. (Brooks Dep. at 50-52); (Affidavit of Rebecca L. Brooks ("Brooks Aff.") ¶6). Following the exposure incident in 1989, plaintiff required additional psychological treatment. *Id.* She advised defendant's management that she could not work anywhere near Ray. (Brooks Aff. ¶3).

DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Rule 569c) mandates the entry of summary judgment, after adequate time for discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The standard for granting summary judgment mirrors the directed verdict standard under Rule 50(a), which requires the court to grant a directed verdict where there can be but one reasonable conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The movant bears the initial burden of asserting the basis of its motion, *Celotex*, 477 U.S. at 323, and that burden is a light one. The movant is not required to negate its opponent's claim. *Id.* Rather, the movant may discharge this burden merely by " 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the non-moving party's case." *Id.* at 325. When this burden is met, the non-moving party is then required to "go beyond the pleadings and . . . designate 'specific facts showing that there is a genuine issue for trial.' " *Id.* at 324.

While the evidence and factual inferences are to be viewed in a light most favorable to the non-moving party, *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1529 (11th Cir. 1987); *Everett v. Napper*, 833 F.2d 1507,

1510 (11th Cir. 1987), the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The non-moving party must come forward with specific facts showing there is a genuine issue for trial. *Id.* at 587. An issue is not genuine if it is created by evidence that is "merely colorable" or is "not significantly probative." *Anderson*, 477 U.S. at 249-50; *Young v. General Foods Corp.*, 840 F.2d 825, 828 (11th Cir. 1988). Similarly, substantive law will identify which facts are material. *Anderson*, 477 U.S. at 248. Thus, to survive a motion for summary judgment, the non-moving party must come forward with specific evidence of every element essential to its case, so as to create a genuine issue for trial. *Celotex*, 477 U.S. at 323; *Rollins*, 833 F.2d at 1528.

B. Title VII Sexual Harassment Claim

Plaintiff claims that defendant subjected her to a hostile work environment in violation of Title VII due to sexual harassment by Delta employee J. B. Ray. Defendant contends that it is entitled to summary judgment on plaintiff's sexual harassment claim because plaintiff's allegations concerning events that occurred before February 11, 1993, are time barred and her allegations are without merit.

1. Timeliness of Plaintiff's Sex Discrimination Claim

As an initial matter, prior to addressing the merits of plaintiff's claims, the court must consider defendant's contention that plaintiff is unable to recover on her

Title VII sexual harassment claim for any events that occurred before February 11, 1993, because events prior to that date were not raised in a timely administrative charge filed with the EEOC. Title VII requires the filing of a charge with the EEOC within 180 days "after the alleged unlawful employment practice occurred." 42 U.S.C. §2000c-5(e). While this requirement is not a jurisdictional prerequisite, it operates in the nature of a statute of limitations. Thus, it shields a defendant from liability for any discriminatory action which an injured party does not raise before the EEOC in a timely filed charge.

In this case, plaintiff alleges that she was subjected to hostile environment sexual harassment based on the conduct of J. B. Ray. She has identified two instances of conduct by Ray which allegedly demonstrate his sexual harassment of plaintiff, as well as two acts by defendant that contributed to the hostile environment. On September 4, 1989, Ray confronted plaintiff in the workplace with his penis exposed. (Brooks Dep. at 162 & ex. 9). Plaintiff next encountered Ray on March 16, 1993, when they both were temporarily working in defendant's local baggage service area. Plaintiff entered the baggage claim area and found herself about twenty feet from Ray. Ray saw plaintiff and walked up to her, said "I want a hug," and embraced her with both arms. (Brooks Dep. at 217-19). Defendant was notified about the first incident on September 4, 1989, and was given notice that plaintiff was receiving psychological treatment as a result of that incident and that she had requested to never again be required to work anywhere near Ray. Sometime in 1991, however, plaintiff was advised that Ray was to be reassigned to the location where she worked. Upon receiving that information,

plaintiff told management employee Joel Johnson that she would not work with Ray and requested and received a transfer to systems baggage. (Brooks Dep. at 184-86). Then, on March 16, 1993, defendant required plaintiff and Ray to report to work in the same area without advising plaintiff that Ray would be assigned there.

Plaintiff filed her employment discrimination charge with the EEOC on August 10, 1993. That charge was timely filed as to any discriminatory conduct occurring on or after February 11, 1993. However, some of the events relied upon by plaintiff to support her harassment claim occurred prior to February 11, 1993. Plaintiff does not contend that her failure to bring a claim earlier is excusable under theories of waiver or estoppel. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Instead, plaintiff contends only that the discrimination which she suffered was of a continuing nature, or, alternatively, that the filing period was equitably tolled because she was harmed by those actions within the 180-day period covered by her EEOC charge; therefore, her claim was timely filed.

Plaintiff argues that her claim is timely because the sexual harassment of which she complains constituted a continuing violation. The Eleventh Circuit has held that "[w]here an employee charges an employer with continuously maintaining any illegal employment practice, [she] may file a valid charge of discrimination based upon that illegal practice until 180 days after the last occurrence of an instance of that practice." *Beavers v. America Cast Iron Pipe Co.*, 975 F.2d 792, 796 (11th Cir. 1992) (quoting *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241, 249 (5th Cir. 1980)). Thus, under the continuing violation doctrine, a claim which

would otherwise be precluded because it is based on conduct which falls outside of the 180-day filing period may nonetheless be considered timely when there is a "substantial nexus" between that conduct and conduct occurring within the filing period. In order to demonstrate a continuing violation, a plaintiff must show (1) the occurrence of a specific act of discrimination within the filing period and (2) a link between this act and the alleged misconduct outside of the filing period which forms the basis of plaintiff's claim. *Id.*; *Saville v. Houston County Healthcare Auth.*, 852 F.Supp. 1512, 1522 (M.D. Ala. 1994).

Since plaintiff's claim was filed on August 10, 1993, she must demonstrate that some actionable discriminatory conduct occurred within 180 days of that charge, that is, between February 11, 1993, and the date of the charge. Plaintiff shows that defendant required her to work in the same facility as Ray on March 16, 1993, and that Ray approached her and embraced her as soon as she encountered him in the workplace. These facts establish conduct that occurred within the filing period.

Plaintiff may recover for the 1989, and 1991, events under a continuing violation theory only if she shows that the events in March, 1993, were a continuation of the earlier acts. Considering these incidents in a light most favorable to plaintiff's case, the undersigned is compelled to conclude that the 1993 actions do not constitute a continuation of the penis exposure event in 1989, or the alleged decision to transfer Ray to plaintiff's work site in 1991. While the earlier events may have contributed to plaintiff's distress from the 1993 events, the exposure and transfer incidents constitute discrete actions that cannot be construed as a continuing course of conduct. For purposes of plaintiff's

continuing violation theory, she has not demonstrated a substantial nexus between those alleged acts and the allegedly harassing conduct which occurred within the 180-day period preceding her EEOC charge. Thus, she has failed to show that defendant engaged in a continuing violation of Title VII.

Plaintiff alleges in the alternative that her claim must be considered timely under the "discovery rule." The Eleventh Circuit has explained that equitable tolling stops the running of the time limit for filing a timely charge of discrimination "until the facts that would support a charge of discrimination under Title VII were apparent or should have been apparent to a person with a reasonably prudent regard for his rights similarly situated to plaintiff." *Ross v. Buckeye Cellulose Corp.*, 980 f.2d 648, 660 (11th Cir. 1993); *accord Sturniolo*, 15 F.3d 1023, 1025 (11th Cir. 1994). Plaintiff complains that Ray exposed his penis to her in 1989, and defendant responded by placing them at different facilities. Then, in 1991, she learned that defendant intended to transfer Ray to the facility at which plaintiff worked. She was forced to request a transfer and take a two-week leave-of-absence until a transfer could be arranged, so that she could avoid possible contact with Ray. The March, 1993, incident occurred as a result of defendant's decision to assign plaintiff and Ray to the same work site. Plaintiff was aware of facts which would have apprised a reasonably prudent person that her rights may have been violated due to defendant's failure to permanently assign plaintiff and Ray to different work sites no later than 1991, when she received notice that Ray was to be transferred to her work site and suffered a change in her work terms and conditions by having to seek a transfer. Furthermore, plaintiff has pointed

to no evidence showing that defendant engaged in any conduct which prevented plaintiff from asserting her rights in an EEOC charge in 1991. Therefore, plaintiff's argument that the deadline for filing an administrative charge concerning the 1989 and 1991 events was equitably tolled until March, 1993, is without merit.

Plaintiff has not shown that defendant's conduct established a continuing violation or that the 180-day filing deadline was equitably tolled. Therefore, plaintiff can recover only for discriminatory conduct occurring within the filing period of February 11, 1993, through August 10, 1993. Plaintiff contends that the events of March 16, 1993, cannot be considered in a vacuum, whereas defendant suggests that the events in 1989, and 1991, cannot be considered to support her harassment claim. A discriminatory act which was not included in a timely charge "may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue . . . ." *United Air Lines, Inc. v. Evans,* 431 U.S. 553, 558 (1977). Thus, the earlier events must be considered to determine whether plaintiff can withstand summary judgment on her sexual harassment claim.

2. Merits of Sexual Harassment Claim

Plaintiff alleges that defendant discriminated against her because of her sex in violation of Title VII by subjecting her to hostile work environment sexual harassment. In a disparate treatment action, the plaintiff carries the burden of demonstrating that the defendant has unlawfully discriminated against her. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981). The allocation of burdens and order of presentation and proof are as follows: (1) plaintiff has the burden of prov-

ing by a preponderance of the evidence a *prima facie* case of discrimination; (2) if the plaintiff succeeds in proving the *prima facie* case, the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for the action taken against the employee; and (3) should the defendant carry this burden, plaintiff must have an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by defendant was a pretext for discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973).

"Although summary judgment should be granted with caution in employment discrimination cases, there are occasions when such disposition is appropriate." *Hudson v. Southern Ductile Casting Corp.*, 849 F.2d 1372, 1376 (11th Cir. 1988). To survive summary judgment in a disparate treatment case, plaintiff is not entitled to rest on her *prima facie* case when the employer offers strong evidence of a legitimate, non-discriminatory reason for the adverse action. Plaintiff must produce significant evidence to raise a genuine issue of fact as to the pretextual nature of the employer's stated reason. *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 595 (11th Cir. 1987). Plaintiff can either diretctly persuade the court that a discriminatory reason more likely motivated the employer or show indirectly that the employer's proffered explanation is unworthy of credence. *Miles v. M.N.C. Corp.*, 750 F.2d 867, 870-71 n.4 (11th Cir. 1985). Plaintiff may use comparative evidence, statistical evidence, or discriminatory statements or admissions. *Id.* at 870.

Sexual harassment in the workplace violates the prohibition in Title VII against subjecting an individual to discrimination "with respect to [her] compensation, terms,

conditions, or privileges of employment because of such individual's . . . sex . . . ." 42 U.S.C. §2000e-2(a)(1); *Steele v. Offshore Shipbuilding Inc.*, 867 F.2d 1311, 1315 (11th Cir. 1989). There are two kinds of sexual harassment claims: *quid pro quo* and hostile work environment. *Quid pro quo* sexual harassment occurs when an employer alters an employee's job conditions as a result of the employee's refusal to submit to sexual demands. *Steele*, 867 F.2d at 1315. Hostile work environment sexual harassment occurs when the employer's conduct " 'has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive environment.' " *Id.* (quoting, *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986)). Plaintiff alleges that defendant Delta, through J. B. Ray, has subjected her to hostile work environment sexual harassment.

Ordinarily, in a hostile environment case, the employer's liability exists only through respondeat superior; therefore, a company is liable only where the corporate defendant knew or should have known of the harassment and failed to take prompt remedial action against the harasser. *Steele*, 867 F.2d at 1316; *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1557-58 (11th Cir. 1987). Plaintiff may show that her employer had knowledge of harassment by proving that she complained to higher management of a problem or by demonstrating that the harassment was so pervasive that an inference of constructive knowledge arises. *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900 (11th Cir. 1988). The employer will be liable even in the absence of notice if "the victim in question had no reasonable available avenue for making his or her complaint known to appropriate management." *Cross v. State of Ala.*, 49 F.3d 1490, 1506 (11th Cir. 1995).

Plaintiff asserts that she experienced hostile work environment sexual harassment when defendant placed her in the same work site as Ray and Ray embraced her with both of his arms around her. A plaintiff may establish a *prima facie* case of hostile work environment sexual harassment by showing that (1) the employee belongs to a protected group, (2) the employee was subjected to unwelcome sexual harassment, (3) the harassment complained of was based upon sex, (4) the harassment complained of affected a "term, condition, or privilege" of employment, and (5) either that the harasser meets the definition of employer or that the employer is liable through respondead superior. *Sparks*, 830 F.3d at 1557; *Henson v. City of Dundee*, 682 F.2d at 903-05 (11th Cir. 1982). "Of course, . . . not all work place conduct that may be defined as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. at 67 (citation omitted).

The phrase "terms, conditions, or privileges of employment" as used in Title VII has been held to be rather extensive.

> A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, *the very fact that the discriminatory conduct was so severe*

> *or pervasive that it created a work environment abusive to employees because of their . . . gender . . . offends Title VII's* broad rule of work place equality.
>
> . . . .
>
> So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, . . . there is no need for it also to be psychologically injurious.
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> . . . .
>
> [W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These *may* include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utteranace; and whether it unreasonably interferes with an employee's work performance.

Harris v. Forklift Systems, Inc., 510 U.S. 17, 22-23, 126 L.Ed.2d 295, 302-03 (1993) (emphasis added).

Defendants contend that plaintiff cannot show that Ray's action was harassing, that it was based on gender, or that it affected a term, condition, or privilege of plaintiff's employment. The evidence shows that plaintiff was diagnosed with depression in 1988, and had advised defendant of her condition and the fact that, without treatment, it could interfere with her performance of the essential functions. In 1989, Ray had approached plaintiff with his penis exposed, causing her severe emotional trauma for which she required additional therapy. Defendant was informed of plaintiff's need for therapy due to that event, as well as plaintiff's request that she have no contact with Ray. Due to his egregious behavior, Ray was instructed to avoid all con-

tact with plaintiff. Nonetheless, upon seeing plaintiff on March 16, 1993, Ray approached her saying he wanted a hug and embraced her with both arms. This conduct, especially when considered in light of the absence of evidence that Ray normally, when approaching male employees, said to male employees, "I want a hug," and then physically embraced such employees with both arms, is sufficient to establish a question of material fact as to whether Ray's action was based upon plaintiff's sex. Plaintiff has provided ample evidence that she felt harassed by this action and that it affected her ability to perform her job. Therefore, plaintiff has established the first, second, and third elements of her *prima facie* case and the subjective portion of the fourth element. Furthermore, Ray's physical embrace of plaintiff, considered in light of his history of having approached her with his penis exposed, could be interpreted by a reasonable person as both severe and threatening. For these reasons, the Magistrate Judge concludes that a reasonable person would perceive the acts as hostile and abusive.[1] Therefore, the Magistrate Judge concludes that plaintiff has established the fourth element of her *prima facie* case of hostile work environment sexual harassment.

Defendant also argues that plaintiff is unable to establish the final element of her *prima facie* case, which

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[1]Contrary to defendant's argument, the number or frequency of the incidents of discriminatory conduct is not dispositive on the issue of whether the environment was hostile or abusive. The Supreme Court has instructed that this element of a plaintiff's case can be determined only by looking at all the circumstances, which *MAY* include any of these factors: the frequency of the conduct, *OR* its severity, *OR* its physically threatening or humiliating nature, *OR* its unreasonable interference with plaintiff's work performance. *Harris v. Forklift Systems, Inc.*, 510 U.S. at 22-23.

requires a showing that Delta is liable for Ray's actions on March 16, 1993, because Delta took prompt remedial action once it knew about the incident. The Supreme Court has ruled that "absence of notice to an employer does not necessarily insulate that employer from liability." *Meritor Savings Bank*, 477 U.S. at 72. In this case, Delta will be liable for Ray's acts if it "knew or should have known of the harassment and failed to take prompt action to remedy the violation. 'The employee can show that the employer had knowledge of the harassment by proving that she complained to higher management of the problem or by demonstrating that the harassment was so pervasive that an inference of constructive knowledge arises.' " *Cross v. State of Ala.*, 49 F.3d 1490, 1507 (11th Cir. 1995) (quoting *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d at 904).[2]

Plaintiff argues that defendant had adequate notice because it knew of the severity of the 1989 incident and had instructed Ray to avoid contact with plaintiff, but it nonetheless failed to ensure that they were not scheduled to work together and allowed plaintiff and Ray to be placed together on March 16, 1993. Plaintiff has

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[2]Emplyoyer liability also can be established by showing that the employer did not provide the plaintiff a reasonable avenue for making her complaint known to defendant. Where a victim of sexual harassment "did not have a reasonable avenue for making his or her complaint known to appropriate management officials, the employer is not shielded from liability because the complainant did not give notice of the activity." *Cross*, 49 F.3d at 1506. In this case, however, the record shows that defendant did have in place during all relevant times a reasonable avenue for complaining to defendant about harassment. However, contrary to Delta's assertion otherwise, its policy does not shield it from liability where harassment occurs even after the employer has notice of a hostile environment or the propensity of an employee to engage in harassing conduct.

presented evidence that, although Delta claims to vigorously enforce its policy against sex discrimination, the warning to Ray in 1989 to avoid contact with plaintiff was not reduced to writing and neither of their supervisors was advised to avoid assigning them to the same work area. (Ealey Dep. at 103-04); (Harris Dep. at 11-13). Thus, in light of the fact that Delta allowed plaintiff and Ray to be placed in the same work site on March 16, 1993, a trier of fact could find Delta liable for the harm suffered by plaintiff due to Ray's actions on that date. Accordingly, the undersigned concludes that defendant is not entitled to summary judgment as to plaintiff's claim of hostile work environment sexual harassment.

C. ADA Claim

Plaintiff argues that she is a disabled person under the Americans with Disabilities Act ("ADA") and that defendant failed to accommodate her disability, causing her to become totally disabled. The ADA, codified at Chapter 126 of Title 42, United States Code, provides legal remedies for intentional discrimination on the basis of a disability. The ADA proscribes discrimination against "a qualified individual with a disability because of the disability of such individual in regard to . . . discharge of employees, . . . job training, and other terms, conditions, and privileges of employment." 42 U.S.C. §12112(a).

Employment discrimination claims brought pursuant to the ADA are analyzed under the same principles applied to claims under Title VII. 42 U.S.C. §12117(a); *e.g., Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 156-57 & n.3 (3rd Cirl 1995) (collecting cases); *West v. Russell Corp.*, 868 F.Supp. 313, 316-17 (M.D. Ala.

1994). Additionally, the provisions of the ADA are to be harmonized with the corresponding provisions of the Rehabilitation Act of 1973, 29 U.S.C. §§701, *et seq.*; *Sawinski v. Bill Currie Ford, Inc.*, 866 F.Supp. 1383 (M.D. Fla. 1994); *accord Newman*, 60 F.3d at 157-58. Thus, to state a *prima facie* case of discriminatory treatment in violation of the ADA, a plaintiff must show (1) that she suffers from a disability, (2) that she is a "qualified individual with a disability," (3) that the employer had actual or constructive knowledge of her disability, and (4) that she requested an accommodation and that there exists a specific accommodation that is reasonable and available. *Willis v. Conoco*, 108 F.3d 282, 284-85 (11th Cir. 1997); *Gordon v. E.L. Hamm & Assoc., Inc.*, 100 F.3d 907, 910 (11th Cir. 1996). Where plaintiff claims the ability to work only with reasonable accommodations, she must specifically identify such accommodations. *E.g., White v. York International Corp.*, 45 F.3d 357, 360, 362-63 (10th Cir. 1995); *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 163-65 (5th Cir. 1996); *Cheatwood v. Roanoke Indus.*, 891 F.Supp. 1528 (N.D. Ala. 1995).

Defendant argues that plaintiff cannot recover under the ADA for any harm caused by the 1989 incident when Ray exposed his penis to her because it occurred prior to the effective date of the ADA, July 26, 1992. However, plaintiff makes clear in her response to defendant's motion for summary judgment that she does not base her ADA claim on the 1989 event. Rather, she refers to that event and other actions predating the effective date of the ADA to show that defendant had knowledge of plaintiff's disability and the accommodation she required on and after the effective date of the ADA.

Delta next asserts that plaintiff cannot show that she suffered a disability within the meaning of the ADA. To establish a *prima facie* case of discrimination due to disability, plaintiff must show initially that she is "disabled" within the meaning of the ADA. A person is disabled if she:

(a) has a physical or mental *impairment* that *substantially limits* one or more of the major life activities; [or]

(b) a record of such impairment; [or]

(c) [is] regarded by [her] employer as having such impairment.

Fessell v. Georgia Ports Authority, 906 F.Supp. 1561, 1568 (S.D. Ga. 1995) (quoting 42 U.S.C. 12102(2)). Thus, for purposes of the ADA, there must be an impairment and a limitation on the individual's major life activities due to impairment. *Gordon*, 100 F.3d at 911. Major life activities are defined as " 'functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.' " *Id.* (citing 29 C.F.R. §1630.2(i)). Plaintiff has provided evidence that she was disabled at all relevant times because of her depression and fragile psychological condition diagnosed in 1988, which, without treatment, interfered with her ability to work. Thus, for summary judgment purposes, plaintiff has established that she suffered a disability as that term is defined in the ADA.

Defendant further contends that plaintiff cannot establish a *prima facie* case under the ADA because defendant had no knowledge of plaintiff's disability and she never requested accommodation. Plaintiff shows that she was diagnosed with depression in 1988, for which she received treatment, that the encounter with Ray in

1989, exacerbated her psychological condition and required additional treatment, and that she disclosed her condition to Delta in order to obtain leaves of absence for treatment and in discussions with her supervisors. Plaintiff states that she required an accommodation to enable her to perform her prior job subsequent to Ray's action in 1989 of exposing his penis to her – specifically that she not be required to work anywhere near Ray again, and she shows that she requested this accommodation after the exposure incident in 1989.[3] There is no evidence that plaintiff expressly notified defendant that her psychological impairment would interfere with her ability to work unless defendant ensured that she never had any further contact with Ray. However, the evidence that defendant was aware that plaintiff received treatment for depression and of the effects of Ray's exposing himself to her in 1989, and that plaintiff expressly requested that she never be required to work near Ray again, is sufficient to create a question of fact as to whether defendant was aware that plaintiff has a disability and that her request not to work near Ray was a request for accommodation of that impairment, but nonetheless, on March 16, 1993, temporarily assigned both plaintiff and Ray to the same work station.

Defendant finally contends that plaintiff's ADA claim cannot survive summary judgment because she cannot show that defendant failed to make a reason-

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[3] Plaintiff contends that she renewed this request for accommodation in 1991, and September, 1992. However, her deposition testimony shows only that in 1991 she once stated that she would not work near Ray and requested transfer after receiving notice that Ray may be transferred to her work site, and that in September, 1992, she once requested, without explanation, that she not be transferred. (Brooks Dep. at 184-90). Both requests were honored by defendant.

able accommodation or that the accommodation she now proposes was both possible and reasonable. The latter argument is based on plaintiff's contention during her deposition that defendant should have taken steps to assure that she never came in contact with Ray under any circumstances. However, plaintiff's evidence shows that the accommodation she allegedly requested was only that she "never had to work anywhere near J. B. Ray again." (Brooks Aff. ¶3). Thus, prior to the encounter in March, 1993, plaintiff never asked for the specific accommodation of protection from any further contact with Ray under any circumstances.

Defendant claims that it is entitled to summary judgment on plaintiff's ADA claim because she now argues that defendant should have accommodated her impairment by preventing her from ever again encountering Ray under any circumstances, but she admits that Delta could not have guaranteed that she would never run into Ray outside of her work station, such as at a grocery store or while having lunch. (Brooks Dep. at 172-74). However, the harm suffered by plaintiff in March, 1993, was caused by an encounter with Ray in the work place during plaintiff's scheduled work time, not some chance encounter at a time or place over which defendant would have no control. Thus, the reasonableness and availability of this recently asserted accommodation is not relevant to plaintiff's ADA claim.

The accommodation actually requested by plaintiff, and relevant to her ADA claim, was that she never have to *work* anywhere near Ray. Defendant acted on that request for accommodation by transferring Ray to another work station located in a separate building from the terminal where plaintiff was assigned, (Brooks Dep. at 163-64), an action that prevented plaintiff from

having any contact with Ray in the work place until March 16, 1993. Defendant's actions proved inadequate once during a period of three and one-half years, on March 16, 1993, when plaintiff and a number of other employees were ordered to report to the baggage area to handle a backlog that had occurred due to inclement weather. (Ealey Dep. at 90-91). Plaintiff exited an office through a door that led to the baggage claim area and saw Ray standing about 20 feet away from her. He approached her and put his arms around her. (Brooks Dep. at 217-18). Prior to that encounter, defendant had not advised Ray's supervisor to make sure that Ray did not come in contact with plaintiff while at work, but instead charged Ray with the duty to ensure that he had no contact with plaintiff at work. (Ealey Dep. at 69-70). However, neither Ray nor plaintiff had a choice about the temporary assignment to airport baggage. *Id.* at 90-91.

Upon consideration of these facts and the record as a whole, the undersigned concludes that plaintiff has shown a question of fact as to whether defendant failed to reasonably accommodate her disability by making sure that plaintiff would have no contact with Ray in the work place. Plaintiff has established a *prima facie* case of discrimination under the ADA. Therefore, it is recommended that defendant's motion for summary judgment be denied as to plaintiff's ADA claim.

RECOMMENDATION

For the foregoing reasons, the Magistrate Judge recommends that defendant's motion for summary judgment [51-1] be denied.

AND IT IS SO RECOMMENDED this 18th day of February, 1998.

/s/ Richard H. Deane, Jr.
RICHARD H. DEANE, JR.
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DIVISION

ATLANTA DIVISION

Civil Action No. 1:96-CV-2228-RCF

REBECCA BROOKS,

Plaintiff,

v.

DELTA AIR LINES, INC.,

Defendant

ORDER FOR SERVICE OF
REPORT AND RECOMMENDATION

Attached is the report and recommendation of the United States Magistrate Judge in this action in accordance with 28 U.S.C. §636(b)(1) and this Court's Local Rules 260 or 500. Let the same be filed and a copy, together with a copy of this Order, be served upon counsel for the parties.

Pursuant to 28 U.S.C. §636(b)(1), each party may file written objections, if any, to the report and recommendations within ten (10) days of service of this Order. Should objections be filed, they shall specify with particularity the alleged error or errors made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining

and filing the transcript of any evidentiary hearing for review by the District Court. If no objections are filed, the report and recommendation may be adopted as the opinion and order of the District Court and any appellate reivew of factual findings will be limited to a plain error review. *United States v. Slay*, 714 F.2d 1093 (11th Cir. 1983), *cert. denied*, 464 U.S. 1050, 104 S.Ct. 729 (1984).

The Clerk is directed to submit the report and recommendation with objections, if any, to the District Court after expiration of the above time period.

AND IT IS SO ORDERED THIS 18th day of February, 1998.

/s/ Richard H. Deane, Jr.
RICHARD H. DEANE, JR.
UNITED STATES MAGISTRATE JUDGE

APPENDIX B

[Filed MAR 27 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

1:96-cv-2228-RCF

REBECCA L. BROOKS

vs.

DELTA AIR LINES, INC.

ORDER

This action is before the court on Magistrate Judge Richard H. Deane, Jr.,'s Report and Recommendation [R&R] [#40-1], which recommends that defendant's motion for summary judgment [#26-1] be denied. Defendant has filed objections to the R&R.[1]

BACKGROUND

From 1969 to 1993, plaintiff Rebecca L. Brooks was employed as a customer service agent with defendant Delta Air Lines, Inc. At certain times during her employment with defendant, plaintiff worked at the airport in Atlanta, Georgia. There, she was acquainted with J.B.

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[1] Defendant has also requested oral argument. The court does not, however, believe that argument is necessary and thus denies defendant's request.

Ray, a co-worker.[2] In September, 1989, Ray exposed his genitals to plaintiff. The incident was immediately reported, and the next day defendant suspended Ray, collected his employment identification, and escorted him off airport property. After receiving the results of a psychological examination of Ray, defendant suspended him without pay and benefits for one month, transferred him away from the airport location where plaintiff worked, and placed him on final warning status for one year. Defendant also instructed Ray to avoid contact with plaintiff. Plaintiff, who had previously been diagnosed with depression, states that she was deeply traumatized by this incident.

Plaintiff had no further contact with Ray until March 1993, when blizzard conditions left the Atlanta airport severely understaffed. As a result, plaintiff and Ray were both assigned to work in the local baggage service area of the Atlanta airport on March 16, 1993. Although there is some dispute regarding exactly what occurred, in essence, Ray greeted plaintiff by putting his arms on her shoulders. Plaintiff immediately reported this encounter, and defendant warned Ray that any further contact with plaintiff would lead to severe discipline. Plaintiff states that she was so traumatized by Ray's conduct that her psychiatric condition worsened considerably. Plaintiff has not worked since this incident and is currently receiving long-term disability benefits on the basis that she is completely and totally disabled. On August 10, 1993, plaintiff filed a charge of discrimination with the EEOC, alleging sexual harassment. Three years later, plaintiff commenced this suit, alleging: (1) that defendant, through the actions of Ray, subjected her to hostile

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[2] Ray never served as plaintiff's supervisor and never had any authority to affect the terms of plaintiff's employment.

work environment sexual harassment in violation of Title VII of the Civil Rights Act of 1964, as amended [Title VII], 42 U.S.C. §20003, *et seq.*; and (2) that defendant failed to accommodate her disability in violation of the Americans with Disabilities Act [ADA], 42 U.S.C. §12101, *et seq.* In due course, defendant filed a motion for summary judgment, arguing that plaintiff could not prevail on either of her claims. The magistrate judge recommends that such motion be denied.

DISCUSSION

A. Summary Judgment Standard

Under Fed. R. Civ. P. 56, the court should grant a motion for summary judgment where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." The movant carries his or her burden by showing the court that there is "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the movant satisfies this burden, then the burden shifts "to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). The court, resolving all reasonable doubts in favor of the nonmovant, must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

B. Hostile Work Environment Sexual Harassment

With regard to plaintiff's claims under Title VII, the magistrate judge first determined that plaintiff could

seek recovery only for discriminatory conduct that occurred after February 11, 1993 – that is, within 180 days of the filing of plaintiff's EEOC charge. Thus, the magistrate judge determined that plaintiff could not pursue a cause of action based upon the events occurring in 1989, she could instead pursue only a claim based on the 1993 incident.[3] Nonetheless, in evaluating whether her claim for the 1993 incident could survive defendant's summary judgment motion, the magistrate judge considered evidence regarding what had happened in 1989 to conclude that there existed a question of material fact with regard to whether plaintiff could demonstrate: (1) that the harassment affected a term, condition, or privilege of her employment, and (2) that defendant knew of the harassment and failed to take remedial action.[4] In its objections to the R&R, defend-

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[3] Defendant seems to believe that the magistrate judge recommends that plaintiff be allowed to proceed with a claim based on the events of 1989. The court does not read the R&R to make any such recommendation. Rather, the court reads the R&R as a clear recommendation to bar any claims based on events occurring prior to February 1993 and finds this recommendation to be correct in both fact and law.

[4] In order to state a claim for hostile work environment sexual harassment, plaintiff must demonstrate that: (1) she is a member of a protected group; (2) she was the subject of unwelcome sexual harassment; (3) the harassment occurred because of her sex; (4) the harassment affected a term, condition, or privilege of her employment; and (5) the employer knew, or should have known, of the harassment and failed to take remedial action. *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904 (11th Cir. 1988). The court's discussion focuses on the last two of these requirements, but defendant also argues that plaintiff cannot meet the third prong of a *prima facie* case. The court rejects defendant's argument because it believes that a reasonable juror could conclude that the greeting between plaintiff and Ray in 1993 occurred because of plaintiff's sex. The parties do not dispute that plaintiff meets the first two prongs.

ant argues that consideration of such evidence was improper. The court cannot agree. Although defendant is correct in its contention that time-barred evidence may not be used to establish a *prima facie* case of discrimination, *see Turlington v. Atlanta Gas Light Co.*, ___ F.3d ___ , 1998 WL 80420, *5 (11th Cir. Feb. 26, 1998), it overlooks the inescapable fact that such evidence may be used as "relevant background evidence" where "the status of a current practice is at issue." *United Air Lines, Inc. v. Evans*, 97 S.Ct. 1885, 1889 (1997). *See also Stewart v. Rutgers, The State University*, 120 F.3d 426, 433 (3d Cir. 1997) ("While the district court was correct in finding that any discrimination claim based on Stewart's 1992-93 tenure denial is time-barred, we reject the notion that the events surrounding that denial are not relevant evidence which Stewart could use at trial.") (citing *Evans*, 97 S.Ct. at 1889). As the Supreme Court has stated, "[T]he critical question is whether any present violation exists." *Evans*, 97 S.Ct. at 1889 (emphasis omitted). Despite defendant's protestations to the contrary, this court agrees with the magistrate judge that plaintiff has stated a *prima facie* case for a present violation and that, in light of what happened in 1989, she has met her burden of demonstrating that a material question of fact exists with regard to defendant's liability for the 1993 incident. Specifically, the court finds that a reasonable juror *could* conclude that Ray's conduct in 1993 was sufficiently "abusive" so as to create a hostile work environment.[5]

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[5] By this, a juror must find, both objectively and subjectively, "that the harassment was sufficiently severe or pervasive to alter the conditions of [plaintiff's] employment and create an abusive working environment." *Watkins v. Bowden*, 105 F.3d 1344, 1355 (11th Cir. 1997). Although defendant's arguments

[footnote continued]

and that defendant failed to take prompt remedial action.[6] Accordingly, defendant is not entitled to summary judgment on plaintiff's Title VII claim to the extent it is based on the events of 1993.

C. ADA Claim

With regard to plaintiff's claims under the ADA, the magistrate judge determined that the existence of certain issues of fact precluded summary judgment. Specifically, the magistrate judge reasoned that plaintiff had shown a question of fact with regard to whether defendant had failed to reasonably accommodate her disability by ensuring that plaintiff would have no contact with Rat at work.[7] Defendant contends that the magistrate judge's reasoning is incorrect because: (1) plaintiff is not "disabled" for purposes of the ADA; (2) plaintiff failed to request an accommodation under the ADA; and (3) plaintiff's demand that she never encounter Ray

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against plaintiff's ability to make this showing are compelling, the court agrees with the magistrate judge that this issue cannot be settled on summary judgment.

[6] In order to succeed with this affirmative defense, a juror must find that defendant's response made it "reasonably likely" that the misconduct would not recur. *Reynolds v. CSX Transportation, Inc.*, 115 F.3d 860, 869 (11th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3324 (U.S. Oct. 27, 1997) (No. 97-726). Once again, the court finds defendant's arguments in this regard to be strong, but agrees with the magistrate judge that this issue cannot be settled as a matter of law.

[7] The ADA prohibits employers from discriminating against qualified individuals with a disability and imposes a duty upon employers to "provide reasonable accommodations for known disabilities unless doing so would result in undue hardship upon the employer." *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285 (11th Cir. 1997).

again at work is unreasonable.[8] The court does not agree that the magistrate judge's reasoning is so flawed. First, depression, of which plaintiff first began complaining in 1988, is a mental impairment that may render an individual disabled if it substantially limits a major life activity, such as working. *See Pritchard v. Southern Company Services,* 92 F.3d 1130, 1132 (11th Cir.), *amended on reh'g,* 102 F.3d 1118 (11th Cir. 1996), *cert. denied,* 117 S.Ct. 2453 (1997). Plaintiff has introduced evidence that she suffers from depression and that it interferes with her ability to work if left untreated. As determined by the magistrate judge, such evidence is sufficient to establish a genuine question regarding whether plaintiff is disabled. Second, there exists a genuine question with regard to whether plaintiff can be said to have requested accommodation of her disability and whether defendant, by assigning plaintiff to the same work area as Ray in March 1993, failed to reasonably honor that request. Lastly, the court cannot say, as a matter of law, that plaintiff's request that she never work near Ray again was unreasonable. Thus, as the magistrate judge determined, plaintiff may be able to prove to a jury that she was a qualified individual with a disability and that defendant discriminated against her by failing to reasonably accommodate that disability. For summary judgment purposes, plaintiff need show no more. Accordingly, the court finds that defendant is not entitled to summary judgment on plaintiff's ADA claim.

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[8] Defendant also argues that plaintiff's claim is barred because it is based on the 1989 incident; an incident that occurred prior to the enactment of the ADA. Plaintiff explains, however, that her cause of action is instead based on the events of 1993; events that occurred after the ADA went into effect.

CONCLUSION

Magistrate Judge Richard H. Deane, Jr.'s Report and Recommendation [#40-1] is APPROVED and ADOPTED as the Order of this Court. Defendant's objections to the R&R are overruled and rejected, and thus its motion for summary judgment [#26-1] is DENIED. Plaintiff's motion to strike [#42-1], which is based on the length of defendant's objections, is also DENIED. Defendant is, however, warned that the court will not accept any future filings that violate the page limitation unless permission to do so is secured in advance.

SO ORDERED, this 29 day of March, 1998.

/s/ Richard C. Freeman
RICHARD C. FREEMAN
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX C

[Filed OCT 1 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

1:96-cv-2228-RCF

REBECCA L. BROOKS

vs.

DELTA AIR LINES, INC.

ORDER

This action is before the court on defendant's motion for reconsideration [#44-1] and motion in the alternative for the certification of an interlocutory appeal [#45-1].[1]

Background

Defendant Delta Air Lines, Inc. seeks reconsideration of the court's March 27, 1998 Order [March Order], in which the court adopted the Report and Recommendation of United States Magistrate Judge Richard H. Deane and denied defendant's motion for summary judgment.

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[1] Defendant has also requested oral argument. The court does not, however, believe that argument is necessary and thus denies defendant's request.

As summarized in the March Order, the essentially undisputed facts of this case are as follows:

> From 1969 to 1993, plaintiff Rebecca L. Brooks was employed as a customer service agent with defendant Delta Air Lines, Inc. At certain times during her employment with defendant, plaintiff worked at the airport in Atlanta, Georgia. There, she was acquainted with J. B. Ray, a co-worker.[2] In September 1989, Ray exposed his genitals to plaintiff. The incident was immediately reported, and the next day defendant suspended Ray, collected his employment identification, and escorted him off airport property. After receiving the results of a psychological examination of Ray, defendant suspended him without pay and benefits for one month, transferred him away from the airport location where plaintiff worked, and placed him on final warning status for one year. Defendant also instructed Ray to avoid contact with plaintiff. Plaintiff, who had previously been diagnosed with depression, states that she was deeply traumatized by this incident.
>
> Plaintiff had no further contact with Ray until March 1993, when blizzard conditions left the Atlanta airport severely understaffed. As a result, plaintiff and Ray were both assigned to work in the local baggage service area of the Atlanta airport on March 16, 1993. Although there is some dispute regarding exactly what occurred, in essence, Ray greeted plaintiff by putting his arms on her shoulders. Plaintiff immediately reported this encounter, and defendant warned Ray that any further contact with plaintiff would lead to severe discipline. Plaintiff states that she was so traumatized by Ray's con-

[2] Ray never served as plaintiff's supervisor and never had any authority to affect the terms of plaintiff's employment.

> duct that her psychiatric condition worsened considerably. Plaintiff has not worked since this incident and is currently receiving long-term disability benefits on the basis that she is completely and totally disabled. On August 10, 1993, plaintiff filed a charge of discrimination with the EEOC, alleging sexual harassment. Three years later, plaintiff commenced this suit, alleging: (1) that defendant, through the actions of Ray, subjected her to hostile work environment sexual harassment in violation of Title VII of the Civil Rights Act of 1964, as amended [Title VII], 42 U.S.C. §2000e, *et seq.*; and (2) that defendant failed to accommodate her disability in violation of the Americans with Disabilities Act [ADA], 42 U.S.C. §12101, *et seq.*

March Order, at 1-2. Defendant contends that the court erroneously denied summary judgment on plaintiff's Title VII sexual harassment and ADA claims. As discussed below, the court agrees.

Discussion

A. Title VII Claim

In the March Order, the court denied summary judgment on plaintiff's Title VII claim, finding that a reasonable juror could conclude that: (1) Ray's conduct in 1993 was sufficiently abusive so as to create a hostile work environment; and (2) defendant failed to take prompt remedial action. Although defendant attacks both holdings, the court assumes for purposes of discussion that Ray's conduct in 1993 – the only conduct that is properly before the court in this case[3] – is sufficiently severe and pervasive to fall within Title

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[3] As explained in the March Order, the 1989 exposure incident was never the subject of an EEOC charge and thus cannot be the basis for plaintiff's Title VII claim.

VII's proscription of sexual harassment. However, it finds summary judgment to be appropriate because there is no basis on which to impute liability for Ray's actions to Delta. "An employer can be either directly or indirectly liable for its employee's sexual harassment of another employee." *Fleming v. Boeing Co.*, 120 F.3d 242, 246 (11th Cir. 1997). Plaintiff's allegations of employer liability are premised on a direct liability theory because she contends that defendant "knew, or upon reasonably diligent inquiry should have known, of the harassment and failed to take immediate and appropriate corrective action.' " *Id.* (quoting *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1535 (11th Cir. 1997) (en banc), *rev'd*, 118 S.Ct. 2275 (1998)).[4]

It is undisputed that, following the 1993 incident, defendant: (1) interviewed Ray, plaintiff, another supervisor, and an eyewitness to Ray's exchange with plaintiff; (2) forwarded the results of this investigation to defendant's EEO officer, who also spoke with plaintiff; (3) informed Ray that he was being reprimanded and sent to counseling; (4) placed a letter in Ray's employment record stating that he was to have no further contact with plaintiff of any kind, whether on or off the job; and (5) offered to help find plaintiff another

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[4] Although the Supreme Court has recently addressed the issue of an employer's vicarious liability for sexual harassment that is carried out by a supervisor of the victim, *see Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998); *Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2257 (1998), these cases are inapplicable because Ray was not plaintiff's supervisor, but was merely a co-worker of hers. The court thus believes that the issue of defendant's liability continues to be governed by *Fleming*, which is a co-worker harassment case, and that *Fleming*'s reliance on the Eleventh Circuit's opinion in *Faragher* is not undermined by the Supreme Court's subsequent reversal of that case.

position in its Atlanta operations. Plaintiff has offered no evidence that, despite these efforts at remediation, she suffered any further harassment by Ray, and the court therefore finds that defendant took "immediate and appropriate corrective action" following the 1993 incident. *Accord Fleming*, 120 F.3d at 247 (granting summary judgment in employer's favor where, following investigation into co-worker's harassment of plaintiff, co-worker was demoted and plaintiff testified that she had no further problems with her harasser).

Plaintiff also argues that defendant should be liable for Ray's actions because its efforts to discipline Ray in 1989 were ineffective by virtue of the fact that Ray harassed her again four years later. Although no Title VII liability may be found based on these allegations because plaintiff never filed an EEOC charge relating to Ray's actions in 1989, even if such a claim could be asserted, defendant would nonetheless be entitled to summary judgment. Once an employer becomes aware of sexual harassment, it is not transformed into a guarantor of its employees' freedom from further harassment; rather, in order to avoid liability, it need only take whatever corrective action is "reasonably likely to prevent the misconduct from recurring.' " *Reynolds v. CSX Transp., Inc.*, 115 F.3d 860, 867 (11th Cir. 1997) (quoting *Kilgore v. Thompson & Brock Management, Inc.*, 93 F.3d 752, 754 (11th Cir. 1996)), *vacated on other grounds*, 118 S.Ct. 2365 (1998).[5] When it learned

[5]The Supreme Court vacated *Reynolds*, a supervisor harassment case, in light of *Faragher*. However, as discussed above, nothing in *Faragher* alters the law applicable to co-worker harassment cases, and thus defendant may still avoid Title VII liability if it can show that its corrective action was reasonably likely to prevent further harassment.

that Ray had exposed his genitals to plaintiff in 1989, defendant: (1) suspended Ray without pay or benefits for one month; (2) transferred him to another location miles away from plaintiff; (3) warned him to have no further contact with plaintiff whatsoever; and (4) placed him on final warning status for one year.

In light of these undisputed precautionary measures, the court does not believe that a reasonable juror could conclude that Ray's decision to ignore defendant's instructions and embrace plaintiff four years later subjects defendant to liability under Title VII. Although Ray came into contact with plaintiff after he was assigned to work at the airport, where plaintiff also worked, he was there only because an emergency situation required the majority of defendant's employees to assist with problems at the airport regardless of their normal duty stations. The court agrees that if defendant's inability to prevent this chance encounter were to support a sexual harassment claim, defendant would in essence be subjected to strict liability for Ray's failure to follow the explicit orders that he had been given in 1989. Because Title VII does not impose such liability on employers, the court grants summary judgment in favor of defendant on plaintiff's Title VII sexual harassment claim.

B. ADA Claim

In the March Order, the court agreed with the magistrate judge that plaintiff had shown a question of fact with regard to whether defendant had failed to reasonably accommodate her disability by ensuring that plaintiff would have no contact with Ray at work. Defendant contends that this result is erroneous because: (1) plaintiff is not "disabled" under the ADA; (2) plaintiff failed to request any accommodation under the ADA;

and (3) plaintiff's demand that she never encounter Ray again at work is unreasonable as a matter of law.

The court agrees with defendant's third argument. While the ADA obligates an employer to accommodate any disability that an employee may have, the employee ,'is not entitled to the accommodation of [his or] her choice, but only to a reasonable accommodation." *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1286 (11th Cir. 1997) (internal citations and quotations omitted). In that regard, the ADA does not require an employer to ensure that an employee is free from any contact whatsoever with other employees whose presence allegedly worsens his or her disability. *See Mears v. Gulfstream Aerospace Corp.*, 905 F. Supp. 1075 (S.D. Ga. 1995) (holding that employer was not required to isolate plaintiff to ensure that she never again encountered a member of her former department), *aff'd*, 87 F.3d 1331 (11th Cir. 1996); *Gaul v. Lucent Technologies, Inc.*, 134 F.3d 576, 581 (3d Cir. 1998) (finding proposed accommodation that employee be transferred away from other employees who cause him stress to be unreasonable as a matter of law). Plaintiff basically asks defendant to accommodate her alleged disability by providing her with an ironclad guarantee that she will never again come into contact with Ray. The court finds this request to be unreasonable as a matter of law and thus grants summary judgment on plaintiff's ADA claim.

Conclusion

Accordingly, defendant's motion for reconsideration [#44-1] is GRANTED, and the court's March 27, 1998 Order is hereby VACATED. Defendant's motion for the certification of an interlocutory appeal [#45-1] is thus

DENIED as MOOT. Magistrate Judge Deane's Report and Recommendation [#40-1] is DISAPPROVED and REJECTED, and defendant's motion for summary judgment [#26-1] is GRANTED. The Clerk is DIRECTED to ENTER JUDGMENT in favor of defendant and to CLOSE this file.

SO ORDERED, this 1st day of Oct, 1998.

/s/ Marvin H. Shoob
RICHARD C. FREEMAN
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX D

[Filed OCT 23 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action File No. 1:96-cv-2228-RCF

REBECCA L. BROOKS,

Plaintiff,

v.

DELTA AIR LINES, INC.

Defendant.

NOTICE OF APPEAL

NOW COMES the plaintiff and hereby gives notice of her appeal from this Court's Order and Judgment of October 2, 1998 reconsidering and vacating the Court's previous denial of defendant's motion for summary judgment, granting summary judgment to the defendant, and entering judgment in favor of the defendant and against the plaintiff.

This 23rd day of October, 1998.

/s/ Susan M. Garrett
SUSAN M. GARRETT
Georgia State Bar No. 286546

SUSAN M. GARRETT, P.C.
118 East Trinity Place
Decatur, Georgia 30030
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Attorney for Plaintiff

[Certificate of Service Omitted in Printing]

APPENDIX E

[Filed JAN 26 2000]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-9398

D.C. Docket No. 96-02228-1-CV-RCF

REBECCA L. BROOKS,

Plaintiff-Appellant,

versus

DELTA AIR LINES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(January 26, 2000)

Before CARNES, BARKETT and MARCUS, Circuit Judges.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

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[1] 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

[footnote continued]

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX F

RELEVANT STATUTES

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

[42 U.S.C. §2000e, *et seq.*]

TITLE VII NONDISCRIMINATION IN EMPLOYMENT

Sec. 2000e. Definitions.

* * *

Sec. 2000e-2. Unlawful Employment Practices.

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) limit, segregate, or classify his employees or applicants for employment in any which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

CIVIL RIGHTS ACT OF 1991

[42 U.S.C. §1981A]

SECTION 1. SHORT TITLE.

This Act may be cited as the "Civil Rights Act of 1991".

SEC. 2. FINDINGS.

The Congress finds that–

(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;

(2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and

(3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

SEC. 3 PURPOSES.

The purposes of this Act are–

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;

(2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989):

(3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and

(4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

TITLE I – FEDERAL CIVIL RIGHTS REMEDIES

* * *

SEC. 102. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION.

The Revised Statutes are amended by inserting after section 1977 (42 U.S.C. 1981) the following new section:

"SEC. 1977A. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION IN EMPLOYMENT.

'(a) Right of Recovery.–

'(1) Civil rights.–In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

* * *